IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE THOTTATHIL B.RADHAKRISHNAN

TUESDAY, THE 19TH DECEMBER 2006 / 28TH AGRAHAYANA 1928

RSA.No. 860 of 2005()

AS.108/2002 of ADDL. DISTRICT COURT, THALASSERY
OS.600/1995 of PRL.S.C.,THALASSERY
(EA 124/99 IN EP 297/98)
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APPELLANT/APPELLANT/CLAIM PETITIONER.

PARAKKAT EMBICHI AHAMMED, S/O.AHAMMED,
S/O.AHAMMED, AGED50 YEARS,
PARAKKAT HOUSE, SEASIDE ROAD, KANNUR.

BY ADV. SRI.A.MOHAMED MUSTAQUE
SRI.M.K.SUMOD

RESPONDENT/RESPONDENTS: RESPONDENTS.
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1. C.PURUSHOTHAMAN, S/O.ACHUTHAN,
AGED 53 YEARS, RESIDING AT KADAMBUR AMSOM,
KADAMBUR DESOM, KANNUR.

2. S.A.ABDURAHIMAN, S/O.MAYANKUNHI HAJEE,
SOOPIKKADU ALIYANTAVIDE HOUSE, MADAYI AMSOM,
VNEGARA DESOM, MUTTAM, KANNUR DISTRICT.

BY ADV. SRI.P.M.PAREETH
SRI.R.PARTHASARATHY

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON 13/12/2006, THE COURT ON 19/12/2006 DELIVERED THE FOLLOWING:

THOTTATHIL B.RADHAKRISHNAN, J

R.S.A.No.860 OF 2005

Dated this the 19th day of December, 2006

JUDGMENT

This second appeal, arising from a claim petition filed under Order XXI Rule 58 of the Civil Procedure Code, has been admitted on the following substantial questions of law:

(i) The decree holder having failed to raise the claim of charge in suit itself over the property attached in the execution, will he be entitled to raise such claim in execution proceedings ?

(ii) The charge under Section 55 (6)(b) of Transfer of Property Act is not being automatic, whether decree holder is entitled to set up such charge in execution proceedings ?

2. The first respondent filed O.S.No.600/95 for recovery of money, to wit, the return of advance paid by him towards part

consideration under an agreement for sale of immovable property. He also claimed damages for loss sustained, quantified at Rs.50,000/-. The trial court decreed the suit partly on 31.7.1998, to pay an amount of Rs.2,14,600/- with 12% interest per annum from the date of suit till realisation, with proportionate costs.

3. In execution of that decree, the first respondent applied for attachment of the property covered by that agreement for sale. On such attachment being ordered, the appellant filed a claim petition under Order XXI Rule 58 of the C.P.Code, contending that the property was sold to him by the second respondent by registered sale deed dated 4.3.1996 and that he is a bonafide transferee for consideration, without notice of any charge and the attachment is, therefore, only to be lifted.

4. In opposition to the claim petition, first respondent decree holder contended that the claim petition is not sustainable, but is one filed with an intention to cause delay in execution

proceedings.

5. The executing court dismissed the claim petition, holding that the transaction held out by the appellant did not inspire confidence and further that there is a charge available to the decree holder first respondent by virtue of Section 55 (6) (b) of the Transfer of Property Act. The lower appellate court dismissed the appeal of the appellant, affirming the views of the trial court particularly that the first respondent has a charge under Section 55 (6) (b) of the Transfer of Property Act.

6. Section 55 (6) (b) of the Transfer of Property Act provides that the buyer is entitled, unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him, to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if

any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its recission. Therefore, a charge under Section 55 (6) (b) is available if the conditions prescribed by that provision are satisfied. It attaches from the moment the buyer pays any part of the purchase money. It would be lost in case of his subsequent default of improperly declining to accept delivery of the property. Therefore, when a charge under Section 55 (6) (b) of the Transfer of Property Act is sought to be enforced and an objection to such enforcement is raised, that requires an adjudication. The decree granted by the trial court to the first respondent is not one after adjudication of his entitlement to charge under Section 55 (6) (b) of the Transfer of Property Act. Neither did he raise any such specific claim nor was his entitlement under Section 55 (6) (b) refuted by the second respondent, the defendant.

7. It cannot be disputed that what can be executed is only a decree and the decree that is put in execution in the instant

case, being one not providing a charge, has to be executed as if it is a simple decree for money. The effect of such a decree on any subsequent suit, based on any civil right of the plaintiff to a statutory charge under Section 55 (6) (b) on the basis of the agreement to sale, does not arise for decision in this case, as of now. So much so, particularly when there is an attachment in execution and when a claim petition is filed on the strength of a registered sale executed before the date of attachment, it was incumbent on the part of the trial court to have tried the case as is required under Order XXI Rule 58, that is, as if it is a suit. The claim ought not have been rejected solely relying on Section 55 (6) (b) of the Transfer of Property Act. A perusal of the file would show that there was no trial and none of the parties were given an opportunity to tender evidence.

In the aforesaid circumstances, the impugned judgment in the first appeal and the order of the executing court are set aside and the case remitted to the executing court for re-consideration of E.A.124/99 by trying the same as a suit, by giving the parties

an opportunity for adducing evidence. The parties are directed to appear before the executing court on 9.1.2007.

THOTTATHIL B.RADHAKRISHNAN
Judge

kkb.